Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

LARRY DRUTIS, HAROLD PARKER,
JOHN WAYNE SIMPSON, and JOSEPH TKACZ,

Petitioners,

v.

QUEBECOR WORLD (USA), INC.,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a cash balance pension plan formed prior to June 29, 2005, per se, violate the provisions of ERISA?

LIST OF ALL PARTIES

1. The Petitioners are Larry Drutis, Harold Parker, John Wayne Simpson, and Joseph Tkacz. Their attorney is Charles W. Arnold, 401 West Main Street, Suite 303, Lexington, Kentucky 40507.

2. The Respondent is Quebecor World (USA), Inc. Its counsel is Carol Connor Flowe, and Gretchen Dixon, Arent Fox PLLC, 1050 Connecticut Avenue, N.W., Washington, DC 20036.

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CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

This Petition for Writ of Certiorari is from an opinion of the United States Court of Appeals for the Sixth Circuit entered on August 27, 2007. The statutory basis for jurisdiction for this Petition for Writ of Certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN CASE

Employment Retirement Income Security Act (ERISA), Section 204(b)(2)(A), codified as 29 U.S.C. § 1054(b)(2)(A):

A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

ERISA Section 204(b)(1)(H)(i); 29 U.S.C. § 1054(b)(1)(H)(i):

Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

STATEMENT OF THE CASE

The petitioners, Larry Drutis, Harold Parker, John Wayne Simpson, and Joseph Tkacz, are current or former employees of the respondent, Quebecor World (USA), Inc. (Quebecor), which operates a commercial printing plant in Versailles, Kentucky, formerly owned and operated by Rand McNally & Co (Rand McNally). In January 1997, Rand McNally sold this printing plant to World Color Press, Inc. (World Color), a large printing company. In 1998, World Color and Quebecor effected a merger under the terms of which the printing plant was conveyed to the surviving entity, Quebecor.

When Rand McNally owned the printing plant, its workers were the beneficiaries of a traditional defined benefit retirement plan. Under the terms of this plan, each worker was entitled to a pension benefit calculated under a formula primarily based on that employee's highest five years of income with the company and the worker's number of years of service.

In January 1997, the workers' participation in the Rand McNally plan was discontinued and they became employees of World Color, and became beneficiaries of the World Color cash balance plan. The four plaintiffs/appellants brought this action, claiming that the cash balance plan violated the terms of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* The United States District Court for the Eastern District of Kentucky, Hon. Karl Forester, Judge, entered a summary judgment in favor of Quebecor. The employees brought a direct appeal in the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the District Court's judgment by an opinion and order dated August 27, 2007 (App. 1). The workers now seek review in this court of that opinion and order.

ARGUMENT

There are two basic types of pension plans: (i) defined contribution plans (where money is actually paid to an account controlled by the employee, such as a 401(k) plan) and (ii) defined benefit plans (where there is only a bookkeeping entry, and the actual benefit received by the worker is not paid until the worker retires). A "cash balance plan," although deceptively named, is a type of defined benefit plan. This case was brought by four workers whose participation in a traditional defined benefit plan was terminated, and whose vested interest therein was valued and that value used as the basis for determining that participant's opening account balance in a cash balance plan.

A defined benefit plan, such as the one provided by Rand McNally for many years, provides each participant with a traditional pension that is calculated under the terms of a formula set out in the pension plan documents. The formula takes into account the employee's number of years of service and, in the case of the Rand McNally plan, the highest years of income earned by that employee. At retirement, Rand McNally analyzed the employee's income and service and, then, calculated the monthly benefit accruing to the employee based on its standard formula.

Cash balance plans are defined benefit plans that use a different formula from the traditional formula to calculate the value of the retirement benefit. A cash balance plan purports to set up an "account" for each employee, which deceptively mocks the actual contribution in a defined contribution plan, such as a 401(k) plan. In fact, there is no such account. Instead, the employer makes a bookkeeping entry for each employee, crediting – on paper only – to that employee a percentage of his or her income for each year as a "contribution" to the cash balance plan. No actual contribution of money is made. The bookkeeping illusion is the fact that separates cash balance plans from defined contribution plans. A second bookkeeping entry is periodically made to the employee's "account," crediting it with an investment return that is also only a bookkeeping entry and not actual money.

Thus, under a defined contribution plan, such as a 401(k) plan, money actually changes hands before the employee retires. The employer makes actual contributions into an account controlled, subject to plan limitations, by the employee. Under a traditional defined benefit plan, like the old Rand McNally plan, no individual account is set up for each employee, because until the employee reaches retirement age and information such as his highest five years of salary and his number of years of service can be computed, the amount of his benefit cannot be finally calculated. Therefore, no money changes hands until the employee retires.

ERISA prohibits age discrimination in both defined contribution plans and defined benefit plans. However, because of the difference in form between the two plans, the age discrimination rules operate differently. Because ERISA considers the pension benefit to have been accrued upon the payment of each employer contribution in a defined contribution plan, such as a 401(k) plan, the age discrimination rule applicable to these plans prohibits any cessation or reduction in the rate at which an employee accrues this benefit on account of age. ERISA Section 204(b)(1)(H)(i); 29 U.S.C. § 1054(b)(1)(H)(i). That is, an employer may not discriminate against older employees by lowering their contribution rate.

The rule that governs defined benefit plans takes into account the fact that the pension benefit to the employee, that is, the "pension entitlement" does not begin until retirement and, therefore, the pension entitlement provided by the plan is the "accrued benefit" at normal retirement age (which the plan

selects but cannot be later than age 65). *Berger v. Xerox Corp. Retirement Income Guarantee Plan,* 338 F.3d 755, 759 (7th Cir. 2003) The age discrimination rule applicable to defined benefit plans prohibits any cessation or reduction in the rate at which an employee accrues this benefit on account of age. ERISA Section 204(b)(1)(H)(i); 29 U.S.C. § 1054(b)(1)(H)(i).

This leaves only the question of how the promise of a future benefit, which has no present value (unlike that of a 401(k) plan), is to be valued. ERISA requires that the accrued benefit be provided in the form of an annuity at normal retirement age. ERISA Section 204(c)(3); 29 U.S.C. § 1054(c)(3). In other words, the ultimate benefit required by ERISA under a defined benefit plan is an annuity payable to the employee beginning on the normal retirement age, here 65. A plan may offer optional benefit forms, such as a lump sum, but they cannot be less than the actuarial equivalent of the annuity at normal retirement age. *Berger,* supra, at 759; *Esden v. Bank of Boston,* 229 F.3d 154, 162-164 (2d Cir. 2000).

Every dollar "credited" to an employee's account under a defined benefit plan, such as a cash balance plan, is really the promise of the value of a one dollar annuity, bought today, and payable beginning on the employee's 65th birthday. Because age is *always* the sole determinant of the value of such an annuity, every dollar of benefit provided to an employee has a value that varies directly and absolutely with the age of the employee.

There are two lines of contradictory authority on whether cash balance plans, per se, violate ERISA. The only two United States Court of Appeals decisions on point, the one under review here, and *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636 (7th Cir. 2006), have held that cash balance plans should be regulated, for all practical purposes, as defined contribution plans rather than defined benefit plans.

This ignores the clear language of ERISA, and this logic has been challenged by a trilogy of United States District Court opinions, *Richards v. FleetBoston Financial Corp.,* 427 F.Supp.2d 150 (D.Conn.2006), *In re J.P. Morgan Chase Cash Balance Litigation,* 460 F.Supp.2d 479 (S.D N.Y. 2006), and *In re Citigroup Pension Plan ERISA Litigation,* 470 F.Supp.2d 323 (S.D.N.Y. 2006).

The *Citigroup* and *J. P. Morgan* opinions expressly rejected the holding and logic of *Cooper*, holding that because age is always the sole determinant of the value of such an annuity, every dollar of benefit provided to an employee has a value that varies directly and absolutely with the age of the employee.

> By definition, under a defined-benefit plan, the employee never receives the credit balance in the Account. Instead, the inputs (contributions and interest credits) the employer makes into the Account must be converted to the age 65 annuity. *Esden*, 229 F.3d at 164 ("Because the Plan is a defined benefit

> plan, any distribution from the plan must be the actuarial equivalent of the accrued benefit expressed as an annual benefit payable at normal retirement age, that is-otherwise expressed-the normal retirement benefit."). You must know an individual's age to perform the actuarial calculation. As a result, the cash balance plan is not age neutral.

J.P. Morgan, supra at 486.

Under this analysis, the World Color Plan was clearly not age neutral. Because of the issues raised by litigation concerning cash balance plans, Congress passed the Pension Protection Act of 2006, P.L. 109-280, 120 Stat. 981, which was signed into law on August 17, 2006. Section 701 of the Act provides that for plans, cash balance plans created after June 29, 2005 will be deemed to comply with the provisions of ERISA. However, because the World Color Plan was formed prior to that date, the amendments do not affect this petition. Section 701(d) of the Act specifically provides that its passage creates "no inference" regarding the legality of plans formed before that date.

"Many pensions were converted to the cash balance format before June 29, 2005. Thus, for these plans, the question addressed by the Seventh Circuit in *Cooper* – Do cash balance pensions age discriminate under pre-PPA law? – is still with us." Zelinsky, Edward A., "Cooper v. IBM Personal Pension Plan: A Critique". New York University Review of Employee Benefits and Executive

Compensation, 2007, Available at SSRN: http://ssrn.com/abstract=926560 (accessed November 23, 2007), at p. 7.

CONCLUSION

This Court should grant certiorari in order to answer the question, important to thousands of American workers, whether cash balance plans created prior to June 29, 2005, per se, violate the terms of ERISA.

Respectfully submitted,

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United States Court of Appeals,
Sixth Circuit.
Larry Drutis; Harold E. Parker; Joe Tkacz; John Wayne Simpson, Individually and on behalf of all persons similarly situated, Plaintiffs-Appellants,
v.
Rand McNally & Co.; Quebecor World (USA), Inc., Defendants-Appellees.

No. 06-6380

Submitted: July 20, 2007.
Decided and Filed: Aug. 27, 2007.

OPINION

ROGERS, Circuit Judge.

The question in this case is whether so-called "cash balance" pension plans violate 29 U.S.C. § 1054(b)(1)(H)(i), an anti-age-discrimination provision of the Employee Retirement Income Security Act ("ERISA"). "Cash balance" plans are defined benefit plans that are structured like defined contribution plans. The district court in this case held, among other things, that the cash balance plan adopted by defendants did not violate the anti-age discrimination statute in question. We agree, and therefore affirm.

I.

The facts of this case are not disputed and the following summary is taken largely from the fact section of the district court opinion. See *Drutis v. Quebecor World (USA), Inc.*, 459 F.Supp.2d 580

(E.D.Ky.2006). The four plaintiffs-Larry Drutis, Harold Parker, John Wayne Simpson, and Joseph Tkacz-were all previously employed by Rand McNally Book & Media Services ("Rand McNally Book") and participated in the Rand McNally & Company Pension Plan ("Rand McNally Plan"), a traditional defined benefit plan. On January 17, 1997, World Color Press, Inc. ("World Color") purchased Rand McNally Book, and the plaintiffs became employees of World Color. The employees' pension benefits were transferred from the Rand McNally Plan, which was merged into the World Color Press Cash Balance Plan ("World Color Plan"). Each former Rand McNally Plan participant who participated in the World Color Plan was credited with a "transition balance" in the new plan that was equal to the amount that the participant would have been paid had the participant taken a lump sum distribution of his Rand McNally Plan benefit on January 16, 1997. This sum was the full actuarial value of the employee's existing accrued benefit. Each month the transition account was credited with interest at the rate payable on one-year U.S. Treasury bills as of December 31 of the preceding year. Additionally, each World Color Plan participant had a "future service account" in which he received monthly credits equal to 4 percent of his monthly compensation plus interest at the one-year Treasury bill rate, with a minimum of 3 percent interest.

The World Color Plan had a "grandfather" provision applicable to those employees who: (1) had an accrued benefit under the Rand McNally Plan on January 16, 1997; (2) were 55 years old on or before that date; and (3) had at least five years of vesting service as of that date. "Grandfathered" participants

could choose as a retirement benefit either (a) the benefit they would have received under the Rand McNally Plan had they continued to participate in that plan until their retirement date, or (b) their cash balance under the World Color Plan. Plaintiffs Drutis and Tkacz retired from World Color on December 31, 1998, and took the distribution of their benefits from the World Color Plan at that time. They both met all of the "grandfather" requirements, and they both chose to receive their benefits calculated as if they had continued in the Rand McNally Plan until their retirement dates. They both were also younger than 65 when they retired.

In 1999, a subsidiary of Quebecor Printing, Inc. merged with World Color, creating the defendant in this case, Quebecor World (USA), Inc. ("Quebecor").[1] In December 2000, the World Color Plan was merged into the Quebecor World Pension Plan, which is not a cash balance plan. After that date, the World Color Plan, which is the subject of this suit, ceased to exist. Accordingly, this case concerns only the World Color Plan in effect from January 17, 1997, through December 31, 2000.

Plaintiff Parker became disabled on August 5, 1996, and retired on disability effective January 31, 1997. He is younger than 65, and has not yet elected to receive his retirement benefits. Plaintiff Simpson is currently an employee of Quebecor and has not received any distribution of his retirement benefits. He is also younger than 65.

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[1] Plaintiffs voluntarily dismissed their claims against Rand McNally after discovery, leaving Quebecor World as the sole defendant in this action.

The plaintiff-employees and Quebecor filed cross motions for summary judgment in district court. The district court denied the plaintiffs' motion and granted Quebecor summary judgment. The district court held that two of the plaintiffs, Drutis and Tkacz, lacked constitutional standing because they were "grandfathered" into the Rand McNally Plan and therefore suffered no injury as a result of the provisions of the newer plan. *Drutis,* 459 F.Supp.2d at 585. The district court also held that none of the plaintiffs could assert a claim of age discrimination under ERISA because each is under the age of 65. *Id.* at 586. In the alternative, the district court held that the World Color cash balance plan did not violate ERISA's anti-age-discrimination provision. *Id.* at 591. Finally, the district court held that the relief sought by the plaintiffs was unavailable under ERISA. *Id.* at 592.

II.

The district court correctly held that two of the four plaintiffs lacked standing to bring this action because they suffered no injury as a result of the challenged plan. The World Color Plan included a "grandfathering" provision that allowed some employees to have their pension benefits determined under the previous Rand McNally Plan. Plaintiffs Drutis and Tkacz were covered by the grandfathering provision and elected to receive the same retirement benefit they would have received under the Rand McNally Plan. As a result of this election, the benefit received by each of these plaintiffs was unaffected by the conversion of the Rand McNally Plan to the World Color Plan. Because their benefits were not

determined by the challenged plan, they suffered no injury as a result of the provisions of that plan.

On appeal, plaintiffs argue that, even though Drutis and Tkacz were not actually subject to the World Color Plan, they still suffered a cognizable injury because "each of them has been damaged by the loss of the difference between what they received [under the Rand McNally Plan] and what they would have received if the [World Color] plan were re-formed to meet the requirements of ERISA." Appellants' Br. at 27. Thus, the plaintiffs' argument is that, instead of choosing between the Rand McNally Plan and the allegedly discriminatory World Color Plan, they should have been able to choose a third option, namely a version of the World Color Plan absent the allegedly age discriminatory aspects.

The benefit to Drutis and Tkacz of this theoretical third plan, however, is entirely speculative. An alternative World Color plan without the allegedly age discriminatory aspects could offer a lower benefit to all employees. As the Seventh Circuit explained in *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636, 642 (7th Cir.2006), "employers can achieve equality more cheaply by reducing the highest benefits than by increasing the lower ones." Thus, any harm to Drutis and Tkacz is hypothetical at best, and it is well established that part of the "irreducible constitutional minimum of standing" is an injury in fact that is "an invasion of a legally protected interest which is ... actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The district court also held that plaintiffs Parker and Simpson did not have "standing to assert a claim of age discrimination" because they were both under age 65, and the district court determined that "ERISA's anti-age discrimination provision does not apply to persons who are not already over the normal retirement age of 65 and continuing to work." *Drutis,* 459 F.Supp.2d at 585.[2] Regardless of whether the district court's determination as to the scope of § 204(b)(1)(H)(i) is or is not correct, this is not a constitutional standing issue, but rather a question of statutory interpretation. Article III standing ultimately turns on whether a plaintiff gets something (other than moral satisfaction) if the plaintiff wins. It does not depend on whether or not there is a disputed statutory impediment to winning. Such an issue goes to the merits. In light of our resolution below of the legality of cash balance plans, we need not decide whether the protection of §

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[2] As the district court noted, some courts looking at the legislative history of ERISA § 204(b)(1)(H)(i) have determined that the statute was intended to protect only workers who had reached the normal age of retirement, i.e., 65, and have therefore held that the statute is inapplicable to younger employees. *Drutis,* 459 F.Supp.2d at 585 (citing *Laurent v. PriceWaterhouseCoopers,* 448 F.Supp.2d 537, 552 (S.D.N.Y.2006) and *Hirt v. Equitable Retirement Plan for Employees, Managers and Agents,* 441 F.Supp.2d 516 (S.D.N.Y.2006)). Other courts, however, have found this limited construction unsupported by the language of the statute, which states that discrimination in the rate of benefit accrual because of the attainment of "any age" is prohibited. See *Sunder v. U.S. Bank Pension Plan,* 2007 WL 541595, *5 (D.Mo.2007); *In re J.P. Morgan Chase Cash Balance Litigation,* 460 F.Supp.2d 479, 484-85 (S.D.N.Y.2006); see also *In re Citigroup Pension Plan ERISA Litigation,* 470 F.Supp.2d 323, 340-41 (S.D.N.Y.2006); *Richards v. FleetBoston Financial Corp.,* 427 F.Supp.2d 150, 159 (D.Conn.2006).

204(b)(1)(H)(i) is limited to persons over 65. We assume, without deciding, that ERISA § 204(b)(1)(H)(i) does apply to plaintiffs Parker and Simpson despite the fact that both are under the age of 65, and proceed to the question of whether the World Color Plan discriminated against Parker and Simpson.

III.

Contrary to the plaintiffs' assertions, cash balance plans do not discriminate based on age in violation of ERISA § 204(b)(1)(H)(i). That statute does not allow a plan provision that reduces "the rate of an employee's benefit accrual ... because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). The plaintiffs' argument is that "cash balance plans per se violate the provisions of ERISA." Appellants' Br. at 7. Accordingly, plaintiffs' claim turns on the nature of cash balance plans in general, and not upon any particular or unique provision of the World Color Plan. The contention that cash balance plans are necessarily age discriminatory under the terms of § 204(b)(1)(H)(i) fails, however, because that provision of ERISA addresses only the employer's contributions to the benefit plan, and any disparity in the benefits that employees of different ages receive from cash balance plans is merely the result of the time value of money.

Resolving the issue in this case requires an understanding of the differences between the two general types of pension plans. As the Third Circuit recently explained,

There are two general types of pension plans: defined contribution plans and defined benefit plans. A defined contribution plan is a pension plan in which an individual account is established for an employee to which his employer (and sometimes the employee too) contributes a specific amount. The employee is entitled "to whatever assets are dedicated to his individual account." The employee bears the investment risks and the employer does not guarantee a retirement benefit to the employee.

A defined benefit plan, on the other hand, is any plan that is not a defined contribution plan. 29 U.S.C. § 1002(35). It is generally a pension plan where the employee is promised a retirement benefit based on a formula the plan sets forth. The plan consists of a "general pool of assets rather than individual dedicated accounts." Participants in a defined benefit plan have no claim to any particular asset that composes a part of the plan's general asset pool, but, instead, receive "an annuity based on the retiree's earnings history, usually the most recent or highest paid years, and the number of completed years of service to the company." Under a defined benefit plan the entity funding the plan, i.e., the employer, bears the investment risks.

Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 61-62 (3d Cir.2007) (internal citations omitted).

A cash balance plan is, by statutory definition, a defined benefit plan. However, cash benefit plans are structured to function like a defined contribution plan.

> A cash balance plan is classified as a defined benefit plan because cash balance plans ... are required to offer payment of an employee's benefit in the form of a series of payments for life.... Nevertheless, a cash balance plan differs from a traditional defined benefit plan in that traditional defined benefit plans define an employee's benefit as a series of monthly payments for life to begin at retirement, but cash balance plans define the benefit in terms of a stated account balance, albeit a "hypothetical" account. Thus, cash balance plans are like defined contribution plans in that both define the employee's benefit in terms of a stated balance.

Id. at 62 (internal citations and quotation marks omitted).

A feature of most cash balance plans is that the hypothetical account, which tells the employee how much his retirement benefit is worth, has two parts: "(1) 'pay credits' or 'earnings credits,' which are hypothetical contributions an employer makes usually expressed as a percentage of wages or salary

and may vary with employee tenure, and (2) 'interest credits,' which are hypothetical earnings ... on the account balance." *Id.* "Employers design cash balance plans so that when a participant receives a pay or earnings credit for a year of service, he also receives the right to future interest credits projected out until normal retirement age." *Id.* at 63. Because younger employees necessarily have a longer period of time before they reach age 65, the projected interest credits are necessarily larger because the projection includes a longer period of compound interest.

As the Seventh Circuit, the first court of appeals to address this issue, explained in *Cooper v. IBM Personal Pension Plan,* it is the difference in the value of the projected interest credits attributable to each employee that can lead to the mistaken belief that cash balance plans discriminate based on age.

> Much of the plaintiffs' argument rests on the idea that the account of a 25-year-old worker does not get 5% plus periodic interest, but instead is immediately credited with 5% of salary plus 40 years' interest. That makes the contributions look discriminatory: the 25-year-old worker's account receives 40 times as much interest credit in the year the contributions accrue as a 65-year-old worker's account.

Cooper, 457 F.3d at 640.

The court in Cooper went on to explain both the source of this apparently discriminatory feature of cash balance plans and why "this perspective

misunderstands both the statute and the time value of money." *Id.*

> Nothing in either ERISA or the [cash balance] plan requires 40 years of interest to be credited to the account as soon as the young worker earns wages. What plaintiffs have in mind is the rule that, when any beneficiary (young or old) elects to take a cash distribution or roll the account into an annuity before reaching age 65, the plan must distribute a lump sum calculated to be the "actuarial equivalent" of the annuity that would be available at normal retirement age. ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3). To derive the "actuarial equivalent" of a pension at age 65, a plan must (a) add all interest that would accrue through age 65, then (b) discount the resulting sum to its present value. *Berger v. Xerox Corp. Retirement Income Guarantee Plan,* 338 F.3d 755, 762-63 (7th Cir.2003). Plaintiffs characterize step (a) as extra interest credits for the young, but they ignore step (b). The discount rate may be close to (if it does not exceed) the rate at which interest is imputed, so the amount paid out in cash may be close to if not below the nominal balance in the account.

Id.

Essentially the plaintiffs in this case, as in *Cooper,* argue that the cash balance plan discriminated against older workers because younger workers, who received the same 4% "pay credit" and the same interest contribution at the one-year Treasury bill rate, would be entitled to a greater annuity upon the normal retirement age of 65. The plaintiffs argue that this, in effect, is a relative reduction in older employees' rates of "benefit accrual" in violation of § 204(b)(1)(H)(i).FN3 To reach this result, the plaintiffs define the term "benefit" in the phrase "rate of benefit accrual" as the overall benefit that the employee is entitled to receive upon retirement at age 65, which ERISA calls the "accrued benefit." 29 U.S.C. § 1054(c)(3) (29 U.S.C. § 1002(23)(A)). When the "rate of benefit accrual" is defined in this way, "because of [the] conversion to an age 65 annuity, younger workers are credited with more years to accumulate interest on their hypothetical accounts. Therefore, as a matter of plain arithmetic, a greater value is added to a younger employee's account than to an older employee's account." In re Citigroup Pension Plan ERISA Litigation, 470 F.Supp.2d 323, 344 (S.D.N.Y.2006).

FN3. The provision states as follows:
Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.
ERISA § 204(b)(1)(H)(i) (29 U.S.C.A. § 1054(b)(1)(H)(i)) (emphasis added).

While some district courts have adopted the position argued by the plaintiffs, see *Richards v. FleetBoston Financial Corp.*, 427 F.Supp.2d 150, 162-68 (D.Conn.2006); *In Re J.P. Morgan Chase Cash Balance Litigation*, 460 F.Supp.2d 479, 485-89 (S.D.N.Y.2006); *In re Citigroup*, 470 F.Supp.2d 323 (S.D.N.Y.2006), the plaintiffs' position requires courts to equate "the rate of benefit accrual" with the term "accrued benefit," which is defined elsewhere in the statute. See 29 U.S.C. § 1002(23) (defining "accrued benefit" in defined benefit plans in terms of an "annual benefit commencing at normal retirement age"). However, "Congress used different phrases in 29 U.S.C. § 1002(23) [defining "accrued benefit"] and § 1054(b)(1)(H) [the anti-age-discrimination provision], rather than the same phrase, and thus 'benefit accrual' and 'accrued benefit' should be understood to mean different things." *Finley v. Dun & Bradstreet Corp.*, 471 F.Supp.2d 485, 491 (D.N.J.2007).

The better view, which has been adopted by both courts of appeals to have considered this issue, is that the "rate of benefit accrual" refers to the employer's contribution to a plan, and therefore any difference in output as a result of time and compound interest does not violate § 204(b)(1)(H)(i). See *Cooper*, 457 F.3d at 638-39; *Register*, 477 F.3d at 61-70. When read in context, and in comparison to the parallel provision prohibiting age discrimination in defined contribution plans, the Seventh Circuit is correct that, "[t]he phrase 'benefit accrual' reads most naturally as a reference to what the employer puts in (either in absolute terms or as a rate of change), while the defined phrase 'accrued benefit'

refers to outputs after compounding." *Cooper,* 457 F.3d at 639. As the opinion in *Cooper* explains:

> The language on which plaintiffs rely was added to ERISA in 1986; Congress also enacted a parallel provision covering defined-contribution plans. Pub.L. 99-509, 100 Stat. 1874, 1975, 1976 (1986). We set these out alongside to facilitate comparison:
>
> Defined-benefit plans: ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i)
> Defined-contribution plans: ERISA § 204(b)(2)(A), 29 U.S.C. § 1054(b)(2)(A)
>
> [A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.
> A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.
>
> These appear to say the same thing, except that the rule for defined-benefit plans tells us what is not allowed, while

the rule for defined-contribution plans tells us what works. Either way, the employer can't stop making allocations (or accruals) to the plan or change their rate on account of age. [A cash balance plan] does neither of these things and therefore, one would suppose, complies with the statute. If this were a real, rather than a phantom, defined-contribution plan, that much would be taken for granted. Yet if the 5%-plus-interest formula is non-discriminatory when used in a defined-contribution plan, why should it become unlawful because the account balances are book entries rather than cash?

Plaintiffs [argue] that the two subsections are radically different. That difference is attributable to the phrase "benefit accrual," which appears in the subsection for defined-benefit plans but not the one for defined-contribution plans. Neither ERISA nor any regulation defines this phrase.... [A different phrase, "accrued benefit"] is defined in § 3(23)(A), 29 U.S.C. § 1002(23)(A). An "accrued benefit" is an amount "expressed in the form of an annual benefit commencing at normal retirement age." Plug this back into § 204(b)(1)(H)(i), and the rule against discrimination then refers not to what [the employer] puts into the plan, but what the employee takes out on retirement.

....

> This approach treats the time value of money as age discrimination. Yet the statute does not require that equation. Interest is not treated as age discrimination for a defined-contribution plan, and the fact that these subsections are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either.... As long as we think of "benefit accrual" as referring to what the employer imputes to the account-an understanding reinforced by the use of the word "allocation" in the subsection addressing defined-contribution plans-there is no statutory difference between the treatment of economically equivalent defined-benefit and defined-contribution plans. For defined-benefit plans, where the account is an accounting entry rather than cash, "benefit accrual" matches the money "allocated" to a defined-contribution plan.

Cooper, 457 F.3d at 638-39.

We agree that the term "benefit accrual" as used in § 1054(b)(1)(H)(i) refers to the employer's contribution to the defined benefit plan. Accordingly, because under the World Color Plan, as with cash benefit plans generally, "[n]either the contribution rate nor the interest rate change [d] with age," plaintiffs have failed to show that the World Color Plan was age

discriminatory. *Id.* at 640. Summary judgment was, therefore, proper in this case, and we need not reach the district court's holding that no form of relief sought by the plaintiff-employees is available under § 502(a)(3) of ERISA.

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

United States District Court,
E.D. Kentucky.
Larry DRUTIS, Harold E. Parker, Joe Tkacz and John Wayne Simpson, Plaintiffs
v.
Quebecor World (USA), Inc., Defendant

No. 04-269-KSF

Sept. 25, 2006.

OPINION AND ORDER

FORESTER, Senior District Judge.

This matter is before the Court on cross motions for summary judgment by Plaintiffs [DE # 57] and the Defendant [DE# 58]. Having been fully briefed, these motions are ripe for review.

I. OPINION

The four Plaintiffs claim that a change in their pension plan from a traditional defined benefit plan to a cash balance plan violated § 204(b)(1)(H), the anti-age discrimination provision of the Employee Retirement Income Security Act ("ERISA").[3] The

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[3] Plaintiffs initially claimed that the opening account balances under the new plan were not the actuarial equivalent of their accrued benefits under the former plan (Complaint, Count I), but their expert witness testified to the contrary (Poulin Dep. At 80, 84). Accordingly, they have withdrawn Count I [DE # 62 at 11]. Plaintiffs also filed claims against Rand McNally, but sought voluntary dismissal of Rand McNally at the conclusion of discovery [DE # 61]. Rand McNally was dismissed with prejudice [DE # 63].

relevant facts are not in dispute. The only dispute concerns the interpretation of the statute and its application to these facts. It is the Opinion of this Court that the change in pension plans did not violate ERISA's anti-discrimination provision, and Defendant is entitled to judgment as a matter of law.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Each of the four Plaintiffs was previously employed by Rand McNally Book & Media Services ("Rand McNally Book") and participated in the Rand McNally & Company Pension Plan ("Rand McNally Plan"), a traditional defined benefit plan. On January 17, 1997, World Color Press, Inc. ("World Color") purchased Rand McNally Book, and the Plaintiffs became employees of World Color. The pension benefits of the employees were transferred to the World Color Press Cash Balance Plan ("World Color Plan"). Each participant in the World Color Plan was credited with a Transition Balance that was equal to the amount they would have been paid if they had taken a lump sum distribution of their Rand McNally Plan benefit on January 16, 1997. This sum was the full actuarial value of the employee's existing accrued benefit. Each month, the Transition Account was credited with interest at the rate payable on one-year U.S. Treasury bills as of December 31 of the preceding year. Additionally, each World Color Plan participant had a Future Service Account in which they received monthly credits equal to 4 percent of their monthly compensation plus interest at the one-year Treasury bill rate, with a minimum of 3 percent interest.

The World Color Plan also had a special "grandfather" provision applicable to those employees who: (1) had an accrued benefit under the Rand McNally Plan on January 16, 1997; (2) were 55 years old on or before that date; and (3) had at least five years of vesting service as of that date. These "grandfathered" participants could choose a retirement benefit that was the greater of: (a) the benefit they would have received under the Rand McNally Plan if they had continued to participate until their retirement date, or (b) their cash balance under the World Color Plan.

Plaintiffs Larry Drutis and Joseph Tkacz retired from World Color on December 31, 1998 and took the distribution of their benefits from the World Color Plan at that time. They both met all of the "grandfather" requirements, and they *583 both chose to receive their benefits calculated as if they had continued in the Rand McNally Plan until their retirement date. They both also were younger than 65 when they retired.

In 1999, a subsidiary of Quebecor Printing, Inc. merged with World Color and the resulting entity is Quebecor World (USA), Inc. ("Quebecor"). In December 2000 the World Color Plan was merged into the Quebecor World Pension Plan, which is not a cash balance plan. After that date, the World Color Plan ceased to exist. Accordingly, this case concerns only the World Color Plan from January 17, 1997 through December 31, 2000.

Plaintiff Harold Parker became disabled August 5, 1996 and retired on disability effective January 31, 1997. He is younger than 65, and has not elected to

receive his retirement benefits. Plaintiff John Simpson is currently an employee of Quebecor and has not received any distribution of his retirement benefits. He also is younger than 65.

In support of their claim of age discrimination, Plaintiffs offered the testimony of Claude Poulin, an actuary. Mr. Poulin testified that he has attended the annual enrolled actuaries meetings in Washington, D.C. since 1976 (Poulin Dep. p. 16). He could not identify any literature presented at these meetings that would support his opinion. In fact, he said the actuaries attending the meetings "would disagree with [his] opinion." Id. at 17. He admitted that the American Academy of Actuaries has "taken the position that cash balance plans are not inherently age discriminatory." Id. at 134, 139. Nonetheless, Mr. Poulln's Report states that the World Color Plan "rates of benefit accrual" decline "with each year of advancing age" and these reductions "are a clear violation of Section 204(b)(1)(H) of ERISA...." [DE # 57, Exhibit D].

III. BACKGROUND ON APPLICABLE PENSION PLANS

A. Defined Benefit and Defined Contribution Plans Generally

Two types of pension plans are recognized by federal law: defined benefit plans and defined contribution plans. See generally, *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). Defined benefit pla..s entitle the participant upon retirement to a fixed periodic payment from a general pool of assets provided by

the employer. The employer "typically bears the entire investment risk and ... must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Id.* at 439, 119 S.Ct. 755. The amount of the "fixed payment" typically is based on a formula including the employee's highest recent earnings and the number of years of service. In a defined benefit plan, the "accrued benefit" is defined as an amount "expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A).

Defined contribution plans, on the other hand, establish an individual account for each participant. The employer contributes periodically to the account, and the employee may be able to supplement those contributions. The benefit at the time of retirement is a function of the balance in the account, consisting of the contributions and the interest or investment earnings on the contributions over the employee's career. The retirement benefit is not a "fixed" amount, but varies depending upon the amount accumulated in the account over time. The participant bears the investment risk.

Cash balance plans, by law, are defined benefit plans, but they function more like defined contribution plans. See Internal Revenue Service Notice 96-8, 1996-1 C.B. 359 ("Notice 96-8"); *Laurent v. PriceWaterhouseCoopers,* 448 F.Supp.2d 537, 538 (S.D.N.Y.2006). Each participant has a hypothetical account to which the employer imputes value through "credits," typically equal to a percentage of compensation, and interest credits based on a specified benchmark, such as the annual yield on one-year U.S. Treasury bills. The interest credits are

not determined by the actual investment yield on the plan's assets; instead, if the actual investment yield falls below the interest rate guaranteed by the plan, the employer is required to make up the difference. To determine an employee's "accrued benefit" under a cash balance plan, an employer is required to provide "credits" for not only the current year of interest but also credits for all years until the employee's normal retirement age. Thus, a participant's account is said to be "front loaded" with estimated interest. Id. at 544-45. If the employee retires and takes a distribution of his pension before the normal retirement age, the hypothetical account balance is discounted back to its present value. See *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636, 641 (7th Cir.2006)

B. The Rand McNally and World Color Plans

The Rand McNally Plan was a traditional defined benefit plan that provided a life annuity at the normal retirement age of 65 based on the number of years of service and compensation. Employees with at least fifteen years of service could choose to receive a distribution at age 55, either in the form of an annuity or a lump sum if their benefit was at least $10,000.

The World Color Plan was a cash balance plan consisting of a Transition Balance equal to the actuarial equivalent of the benefit earned under the Rand McNally Plan as of January 16, 1997, plus credits for interest on that amount, and a Future Service Account in which each participant received credit each month for 4 percent of his or her monthly compensation, plus interest at the one-year Treasury

bill rate or a minimum of 3 percent. Each employee received the same 4 percent of compensation credit and rate of interest credit whether the employee was 25, 45, 55 or any other age.

IV. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. R. 56(c); *U.S. v. One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 417 (6th Cir.2006). When deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Browning v. Department of Army,* 436 F.3d 692 (6th Cir.2006).

B. Standing

1. Plaintiffs Drutis and Tkacz

For this Court to have jurisdiction under Article III of the United States Constitution, a plaintiff must allege an actual case or controversy.

To satisfy this "case or controversy" requirement, "a plaintiff must establish three elements: (1) an injury

in fact that is concrete and particularized; (2) a connection between the injury and the conduct at issue-the injury must be fairly traceable to the defendant's action; and (3) [a] likelihood that the injury would be redressed by a favorable decision of the Court."

Airline Professionals Association of the International Brotherhood of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc., 332 F.3d 983, 987 (6th Cir.2003), quoting *Courtney v. Smith,* 297 F.3d 455, 459 (6th Cir.2002). "Injury-in-fact means that the plaintiff has 'sustained or is in immediate danger of sustaining some direct injury.' " Id., quoting *Massachusetts v. Mellon,* 262 U.S. 447, 448, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

Quebecor argues that Plaintiffs Drutis and Tkacz lack standing to bring this action because they have no injury. As mentioned above, persons who were grandfathered had a choice upon retirement of having their pension benefits determined by the greater of: (a) the benefit they would have received under the Rand McNally Plan as if they had continued to participate until their retirement date, or (b) their cash balance under the World Color Plan. Plaintiffs' expert, Claude Poulin, admitted that, with such a grandfather provision, a grandfathered employee would not "have been harmed by becoming a participant in the World color plan." (Poulin Dep. P. 120-121). He appeared unaware that Drutis and Tkacz were grandfathered employees (Id. at 121-122).

In the present case, Plaintiffs Drutis and Tkacz specifically chose that their pension benefits were to

be determined by the benefit they would have received under the Rand McNally Plan as if they had continued to participate until their retirement date, taking into consideration their additional service and interest under the World Color Plan. When plaintiffs have a choice between the greater of their pension benefits calculated under their old defined benefit plan or their new cash balance plan, and they choose the old plan, they have suffered no injury as a result of the company's conversion to the new cash balance plan. Accordingly, Plaintiffs Drutis and Tkacz have no injury in fact, and this Court lacks jurisdiction to consider their claims of age discrimination.

In *Goldman v. First National Bank of Boston,* 1992 WL 142031 (D.Mass.), the plaintiff claimed age discrimination as a result of changes in his pension plan. The court noted, however, that the plaintiff was given the choice of the greater benefits under the old or new plan. "Therefore, any changes in the retirement plan cannot support an inference of age discrimination." Id. at *2.

2. Plaintiffs Simpson and Parker

There is persuasive authority that ERISA's anti-age discrimination provision does not apply to persons who are not already over the normal retirement age of 65 and continuing to work. The most recent case to consider this issue is *Laurent v. PriceWaterhouseCoopers,* 448 F.Supp.2d 537, 552-53 (S.D.N.Y.2006), where the court held:

> First, the ERISA anti-discrimination provision does not apply to employees who have not yet reached normal

> retirement age. I agree with the majority view that the legislative history and statutory language of ERISA provide strong evidence that the age discrimination provision was not intended to protect employees until after they reach normal retirement age.

That court found "particularly persuasive that the statutory headings in the parallel provision in the I.R.C. refer to the accrual of benefits 'beyond normal retirement age' as being the subject of the anti-discrimination provision." *Id.*

The court in *Hirt v. Equitable Retirement Plan for Employees, Managers and Agents,* 441 F.Supp.2d 516 (S.D.N.Y.2006), discussed at length the legislative history leading up to the anti-age discrimination provision in issue. It noted that the amendment to section 204(b)(1)(H) of ERISA was enacted as part of the Omnibus Budget Reconciliation Act of 1986 ("OBRA of 1986"), Pub.L. No. 99-509, § 9202(a)(2), 100 Stat.1975, and that the internal Revenue Code was similarly amended. Id. § 9202(b)(3), 100 Stat. At 1977. *Hirt* at 544-45. Section 9202 of OBRA was headed "Benefit Accrual Beyond Normal Retirement Age," and the parallel amendment to the internal Revenue code was entitled "Continued Accrual Beyond Normal Retirement Age." Statutory headings that are consistent with the legislative history may be used to determine Congressional intent. *Barnes v. Oddo,* 219 F.2d 137, 142 (2d Cir.1955). "The Conference Report made clear also that 'the rules preventing the reduction ... of benefit accruals on account of the attainment of age are not intended to apply ... for

employees who have not attained normal retirement age.'" *Id.*, quoting H.R. rep. 99-1012, at 367 (1986) (Conf. Rep.), 131 Cong. Rec. 18,868 (July 11, 1985). The court noted that, after the statute itself, the conference report is the most "authoritative and reliable material of legislative history." *Id.* at 545-46. The *Hirt* court concluded that "the statutory amendment was intended to prevent discrimination against employees who wished to work past their normal retirement age without compromising their ability to continue earning pension benefits." *Id.* at 544-45.

Several other courts have reached the same conclusion. *Tootle v. ARINC, Inc.*, 222 F.R.D. 88, 93 (D.Md.2004) ("First, the legislative history and statutory language provide strong evidence that this aspect of ERISA is not intended to protect workers until after they have attained normal retirement age."); *Eaton v. Onan Corporation,* 117 F.Supp.2d 812, 815 (S.D.Ind.2000) ("First the legislative history shows that these specific prohibitions do not apply at all to employees who have not yet reached normal retirement age."); *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 10 (1st Cir.2003) ("First, the ERISA age discrimination provision may not even apply to workers younger than the age of normal retirement.").

Under this interpretation of the statute, it is the Opinion of this Court that none of the Plaintiffs have standing to assert a claim of age discrimination. In response to these authorities, Plaintiffs rely heavily on the decision in *Cooper v. IBM Personal Pension Plan,* 274 F.Supp.2d 1010 (S.D.Ill.2003) [DE # 62 p.4]. Unfortunately for Plaintiffs, that decision was

recently reversed by the Seventh Circuit. *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636 (7th Cir.2006). Even if the Plaintiffs were to have standing, however, their claims are without merit.

C. The Conversion From the Rand McNally Traditional Defined Benefit Plan to the World Color Cash Balance Plan Did Not Violate ERISA's Anti-age Discrimination Provision

1. Review of Recent Decisions.

As employers began converting their pension plans from traditional defined benefit plans to cash balance plans, employees initiated a flurry of litigation claiming various violations of ERISA. See *Eaton v. Onan Corp.,* 117 F.Supp.2d 812, 818 (S.D.Ind.2000); *Register v. PNC Financial Services Group, Inc.,* 2005 WL 3120268 at *1 (E.D.Pa.2005). The Plaintiffs in this case raise one of the more recent attacks, that the conversion of their plan violated ERISA's prohibition against age discrimination. Their argument is virtually the same as the plaintiffs in the cases below.

The Seventh Circuit recently became the first Circuit Court of Appeals to decide this question in *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636 (7th Cir.2006). Cooper brought a class action claiming that IBM's cash balance pension plan, which replaced a traditional defined benefit plan, violated

the anti-age discrimination provision of ERISA. The district court agreed with the plaintiffs. *Cooper v. IBM Personal Pension Plan,* 274 F.Supp.2d 1010 (S.D.Ill.2003). The Seventh Circuit strongly disagreed. *Cooper,* 457 F.3d at 638. Instead of a decision for plaintiffs, the court remanded the case with directions to enter judgment in favor of IBM. *Id.* at 642.

The *Cooper* court first noted, with respect to the cash balance plan, that: "All terms of IBM's plan are age-neutral. Every covered employee receives the same 5% pay credit and the same interest credit per annum." *Id.* at 638. The court then compared the anti-age discrimination language added to ERISA in 1986 regarding defined benefit plans to the parallel provision covering defined contribution plans. For defined benefit plans, ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i) says:

> [A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

For defined contribution plans, ERISA § 204(b)(2)(A), 29 U.S.C. § 1054(b)(2)(A) says:

> A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the

> employee's account is not reduced, because of the attainment of any age.

As noted by *Cooper,* the language of one statute says what is not allowed, while the other says what works. *Id.* at 638. It is clear that these two parallel statutes have an identical purpose-to prohibit age discrimination in these two types of federally authorized pension plans. Accordingly, the parallel language should reference the same thing.

Because the term "benefit accrual" in the defined benefit plan provision is not defined, plaintiffs have argued that the definition of "accrued benefit" is applicable. Accrued benefit for defined benefit plans is defined as an amount "expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(a). As the Seventh Circuit expressed the issue, the district court was persuaded to look at "what the employee takes out on retirement" rather than "what IBM puts into the plan." *Id.* at 638. Since the "accrued benefit" (annual benefit commencing at normal retirement age) for a young person, who has more years for interest to compound before reaching age 65, is greater than the "accrued benefit" for an older person who has far less time for interest to compound, plaintiffs have argued that the difference in benefits meant that cash balance plans discriminate on the basis of age. In response to this claim, the Seventh Circuit said:

> This approach treats the time value of money as age discrimination. Yet the statute does not require that equation. Interest is not treated as age discrimination for a defined-

> contribution plan, and the fact that these subsections are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either. The phrase "benefit accrual" reads most naturally as a reference to what the employer puts in (either in absolute terms or as a rate of change), while the defined phrase "accrued benefit" refers to outputs after compounding.

Id. at 638-639. The court noted that this interpretation of "rate of benefit accrual" is supported by draft regulations from the Treasury Department treating "the 'rate of benefit accrual' as 'the increase in the participant's accrued normal retirement benefit for the year.' " Id. at 639. The Seventh Circuit concluded that " 'benefit accrual' (for defined-benefit plans) and 'allocation' (for defined-contribution plans) both refer to the employer's contribution rather than the time value of money between contribution and retirement." *Cooper*, 457 F.3d at 639.

This Court agrees with the majority view expressed by the Seventh Circuit. One statute says that an employee's "benefit accrual" cannot be ceased or the "rate of an employee's benefit accrual" cannot be reduced. ERISA § 204(b)(1)(H)(I). The parallel statute says "allocations to the employee's account are not ceased" and "the rate at which amounts are allocated to the employee's account is not reduced." It is unfortunate that Congress chose to express one directive in negative language and the other directive in positive language, but the Congressional intent to

avoid age discrimination under both plan types can only be carried out if "benefit accrual" means the same thing as "allocations to the employee's account." This Court finds additional support for this position in the analyses provided by the following cases.

The most recent case to address the issue of whether cash balance plans discriminate on the basis of age is *Laurent v. PriceWaterhouseCoopers,* 448 F.Supp.2d 537 (S.D.N.Y.2006). That court granted PriceWaterhouseCoopers' motion to dismiss the claim. Regarding the meaning of "benefit accrual," the court said:

> Because cash balance plans accrue benefits otherwise than traditional defined benefit plans, and in particular are not defined in terms of an age 65 annuity, it is logical that the rate of benefit accrual is not determined by the change in the age 65 annuity, but is instead determined by the change in account balance.

448 F.Supp.2d at 552-53. Regarding the plaintiffs' analysis, the court said: "Under this line of reasoning, all cash balance plans violate the ERISA age discrimination provision." *Id.* at 551-52. In rejecting the claim of age discrimination, the court said: "The effect of a younger employee's pay credits being worth more than those paid to older workers is caused not by discrimination but by the time value of money." *Id.* at 552-53. The *Laurent* court further noted that the Department of Treasury has

consistently said that "cash balance plans are not age discriminatory." *Id.* at 554-55.

Like the Plaintiffs in the present case, the plaintiffs in Laurent relied heavily on the decision in *Richards v. FleetBoston Fin. Corp.*, 427 F.Supp.2d 150 (D.Conn.2006), where the court equated the term "rate of benefit accrual" with "rate of accrued benefit." *Id.* at 164. That court recognized that if "a participant's rate of benefit accrual [is] to be 'measured in terms of the change in the balance of each participant's hypothetical account,' then the Amended Plan does not discriminate on the basis of age." *Id.* at 162, quoting *Eaton v. Onan Corp.*, 117 F.Supp.2d 812, 824 (S.D.Ind.2000). The *Richards* court was persuaded by the lower court decision in *Cooper v. IBM Personal Pension Plan*, 274 F.Supp.2d 1010 (S.D.Ill.2003), rev'd, 457 F.3d 636 (7th Cir.2006) and the similarity in the phrases "benefit accrual" and "accrued benefit" to conclude that the "rate of benefit accrual" was to be measured "as a change in the annual benefit commencing at normal retirement age." *Richards*, 427 F.Supp.2d at 164-165. The *Laurent* court noted that *Richards* was the only current case with this conclusion and it disagreed with the *Richards* analysis. *Laurent*, 448 F.Supp.2d at 552-53.

In *Hirt v. Equitable Retirement Plan for Employees, Managers and Agents*, 441 F.Supp.2d 516 (S.D.N.Y.2006), the court rejected a similar claim of age discrimination. Equitable Life Assurance Society of America ("Equitable") began in 1988 to change its traditional defined benefit plans based on final years of compensation to annually adjusted cash balance plans. Id. at 517-18. Its employees filed a class action

claiming that the cash balance plans discriminated against older employees. The court granted summary judgment in favor of Equitable on this issue.[4]

The court explained the history of changes from traditional defined benefit plans to cash balance plans:

> By the late 1980's, particularly in light of changing economic conditions and uncertain stock markets, companies became interested in reducing their obligations under defined benefit plans. As the nation's work force became more mobile, the interest of participants in earlier vesting and more flexible portability of their retirement benefits also grew. Cash balance plans were introduced to satisfy these interests.

Id. at 520-21. The *Hirt* court carefully considered the legislative history associated with the anti-age discrimination provisions and the subsequent agency interpretations. In particular, it discussed the 2002 proposed regulations by the Internal Revenue Service. These proposed regulations acknowledged that "interest credits for a younger participant will compound over a greater number of years until normal retirement age than for an older participant," but then said "the rate of benefit accrual ... is permitted to be determined as the addition to the participant's hypothetical account for the plan year." *Id.* at 546-47. Noting that proposed regulations do

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[4] Summary judgment against Equitable was granted on a claim of materially defective notice.

not have the force of law, the court said "they are entitled to respect to the extent that they have the power to persuade." *Id.* at 548-49. Moreover, the court said these proposed regulations "are consistent with the regulatory interpretations of related statutes" saying "cash balance plans and cash balance conversions are not inherently age-discriminatory." *Id.*

In *Tootle v. ARINC, Inc.*, 222 F.R.D. 88 (D.Md.2004), the court considered an age discrimination claim as a result of ARINC converting from a traditional defined benefit plan to a cash balance pension plan. *Id.* at 90. The court rejected the claim, saying:

> The potential claim of age discrimination arises only by applying a definition for accrued benefits which does not fit with the way cash balance plans are structured. The more sensible approach is to measure benefit accrual under cash balance plans by examining the rate at which amounts are allocated and the changes over time in an individual's account balance.

Id. at 94. The court denied class certification and dismissed the age discrimination count for failure to state a claim.

Eaton v. Onan Corp., 117 F.Supp.2d 812 (S.D.Ind.2000) was one of the earliest cases to address the issue presented here. As a result of Onan Corporation's converting its defined benefit plan to a cash balance design, its employees claimed age discrimination. *Id.* at 814-815. The court provided a

thorough discussion of the history of cash balance plans, the benefits to employees and employers, and why older workers are unhappy with the conversions. *Id.* at 816-818. The court recognized that the "dispute between the parties is one of statutory interpretation" and that the change in the rate of accrued benefit, on which the employees relied, "results simply from the time value of money." *Id.* at 823. After carefully reviewing the legislative history, the purposes of the legislation and the practical impact of its decision, the court concluded that the anti-age discrimination provisions may not apply at all to employees under age 65. *Id. at 826.* It further concluded that "in the case of a cash balance defined benefit plan, the rate of benefit accrual should be defined as the change in the employee's cash balance account from one year to the next." *Id.* at 832-33.

Finally, in *Register v. PNC Financial Services Group, Inc.*, 2005 WL 3120268 (E.D.Pa.2005), the court considered the age-discrimination claims of current and former PNC employees arising from PNC's conversion of a traditional defined benefit plan to a cash balance plan. That court, likewise, recognized that the issue is one of statutory interpretation. Id. at *4. It reviewed the existing case law and concluded that it agreed with the analysis of *Eaton v. Onan Corp. Id.* at *6. The court found further support in the Treasury Department proposed 2002 regulations and the Revenue Proposals for 2005 and 2006 where the Department noted the disagreement between *Cooper* [before reversal] and *Eaton* and said: "cash balance plans and cash balance conversions are not inherently age-discriminatory." *Id.* at *7. The court granted the PNC's motion to dismiss the complaint.

2. Application of Recent Decisions to the Present Case

The World Color Plan allocated 4 percent of each employee's monthly salary to the employee's Future Service Account and applied interest at the same rate to the account balance. These terms are age-neutral; everyone was treated the same.

Plaintiffs' claim of age discrimination was based solely on the opinion of their expert, who said in his report: "The rate of benefit accrual under a defined benefit plan is equal to the increase in the accrued benefit from one year to the next divided by the participant's compensation for the year." [DE # 57, Exhibit B, p.2]. From this definition of "rate of benefit accrual," which is tied directly to a change in "accrued benefit," Mr. Poulin analyzed World Color's cash balance plan and the changes at various ages in the accrued benefit. Based on this analysis, he concluded that the plan "reduces the participants' rates of benefit accrual by .01% to .04% with each year of advancing age. These reductions, which are solely attributable to age and to no other factor, are a clear violation of Section 204(b)(1)(H) of ERISA...." Id. pp. 2,8.

The fatal flaw in this analysis is that it hinges upon an incorrect definition of "rate of benefit accrual." While factual evidence must be viewed in favor of the non-moving party in deciding a motion for summary judgment, the dispute in this case does not involve a genuine issue of material fact. The entire dispute is the meaning of the phrase "rate of benefit accrual." Issues of statutory interpretation present questions

of law, not fact. *U.S. v. Alvarez,* 266 F.3d 587, 592 (6th Cir.2001); *Ammex, Inc. v. U.S.,* 367 F.3d 530, 533 (6th Cir.2004).

With the lone exception of *Richards v. FleetBoston Fin. Corp.,* 427 F.Supp.2d 150 (D.Conn.2006), all courts considering the definition of "rate of benefit accrual" for defined benefit plans have concluded that it means the same as "allocation" for defined contribution plans or "what the employer puts in." *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636, 639 (7th Cir.2006) (" '[B]enefit accrual' reads most naturally as a reference to what the employer puts in"); *Laurent v. PriceWaterhouseCoopers,* 448 F.Supp.2d at 552-53 (S.D.N.Y.2006) ("[T]he rate of benefit accrual is not determined by the change in the age 65 annuity, but is instead determined by the change in account balance."); *Hirt v. Equitable Retirement Plan,* 441 F.Supp.2d at 549-50 (S.D.N.Y.2006) ("[T]he rate of contributions to Cash Account balances, and thus the rate of benefit accrual, do not change; they are equal regardless of age."); *Tootle v. ARINC, Inc.,* 222 F.R.D. 88, 94 (D.Md.2004) ("the more sensible approach is to measure benefit accrual under cash balance plans by examining the rate at which amounts are allocated and the changes over time in an individual's account balance."); *Eaton v. Onan Corp.,* 117 F.Supp.2d 812, 832-33 (S.D.Ind.2000) ("[I]n the case of a cash balance defined benefit plan, the rate of benefit accrual should be defined as the change in the employee's cash balance account from one year to the next."); *Register v. PNC Financial Services Group, Inc.,* 2005 WL 3120268 at *7 (E.D.Pa.2005) ("Cash balance plans are not defined in terms of an age 65 annuity, rather they are defined in terms of an

account balance that grows with pay credits and interest. Therefore, it follows logically that the rate of benefit accrual is determined by the change in the account balance."). These decisions are supported by Treasury Department interpretations of the statute. *Cooper*, 457 F.3d at 639; *Laurent*, 448 F.Supp.2d at 545-55, *Hirt*, 441 F.Supp.2d at 545-48, *Register*, 2005 WL 3120268 at *7-8. Agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *U.S. v. Mead Corp.*, 533 U.S. 218, 218-19, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

This Court joins the majority of courts in rejecting an interpretation of "rate of benefit accrual" for cash balance pension plans as being the same as "accrued benefit" and, instead, adopting a definition consistent with changes in the account allocations or account balance. Accordingly, the Defendant is entitled to summary judgment on this issue.

D. The Relief Sought By Plaintiffs Is Not Available Under ERISA

Plaintiffs seek "a monetary judgment for their compensatory damages" and a mandatory injunction requiring Quebecor to reinstate the terms of the old Rand McNally Plan or modify the World Color plan to conform to the provisions of ERISA [DE # 1 pp. 17-18]. In their response to Defendant's Motion for Summary Judgment, Plaintiffs provide a "rough quantification" of the loss suffered by Drutis and Tkacz and the measure of damages they would present at trial [DE # 62 p. 7]. ERISA does not

authorize a civil action for monetary damages, however. Section 502(a)(3) of ERISA provides a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

(Emphasis added.) In *Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper, Inc.*, 382 F.3d 587 (6th Cir.2004), a plaintiff argued that an improper discount factor was used when calculating his lump sum retirement benefits. He claimed his benefit was $5,249.08 less than he should have received, and he sought recovery of additional lump sum benefits. The district court granted summary judgment for the plaintiff and ordered a recalculation of benefits. The Sixth Circuit reversed because "such relief ... was not available under the statutory provision on which the plaintiff elected to base his action." *Id.* at 589. "Almost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages....' " *Id.* at 594. See also *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401, 405 (10th Cir.2004) (injunctive relief to compel payment of life insurance benefits is barred in that it is not equitable relief).

To the extent Plaintiffs seek reinstatement of the Rand McNally Plan or reformation of the World Color Plan, that relief is also unavailable. For Rand McNally Book employees, the Rand McNally Plan was merged into the World Color Plan when the Plaintiffs became World Color employees. The World Color Plan ceased to exist in 2000 when it was merged into the Quebecor Plan. The Quebecor Plan is not a cash balance plan. There is nothing to reinstate or reform. Thus, even if Plaintiffs had standing and stated a valid claim, they are not entitled to the relief they seek from the Defendant.

V. CONCLUSION

The Court, being otherwise fully and sufficient advised, HEREBY ORDERS:

A. Defendant's motion for summary judgment [DE # 58] is GRANTED;

B. Plaintiffs' motion for partial summary judgment [DE # 57] is DENIED;

C. Judgment in favor of Quebecor World (USA), Inc. shall be entered contemporaneously with this Opinion and Order.

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No. 07-1392

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

LARRY DRUTIS, HAROLD PARKER, JOHN WAYNE SIMPSON, and JOSEPH TKACZ,

Petitioners,

v.

QUEBECOR WORLD (USA) INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A defined benefit pension plan violates ERISA's prohibition against age discrimination "if, under the plan, the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H).

The question presented is:

Whether the "rate of an employee's benefit accrual is reduced, because of the attainment of any age," under a cash balance formula in which all employees earn pay credits and interest credits to their retirement accounts at the same rate, regardless of age.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Quebecor World (USA) Inc. makes the following disclosure:

Quebecor World (USA) Inc. is a wholly-owned subsidiary of Quebecor World, Inc., which is, in turn, a wholly-owned subsidiary of Quebecor, Inc., a publicly-held company. No publicly held company owns 10 percent or more of the stock of Quebecor, Inc.

On January 21, 2008, Quebecor World (USA) Inc. filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Case No. 08-10152.

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STATEMENT

Petitioners seek review of a decision of the Court of Appeals for the Sixth Circuit rejecting their claims that a cash balance plan discriminates against employees on the basis of age in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* The Sixth Circuit, agreeing with the only other two courts of appeals that have addressed this issue, as well as the vast majority of the district courts, held that the plan is not age discriminatory merely because younger employees, who have more years to work before attaining age 65 than otherwise similarly-situated older employees, will accumulate more interest in their retirement accounts by age 65 than the older employees.

ERISA recognizes two types of employee retirement plans: defined benefit plans and defined contribution plans. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 433 (1999). In a defined benefit plan, a plan participant is entitled to a fixed benefit payment upon retirement. *Id.* at 439 (citing *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993)). Benefits are paid from "a general pool of assets rather than individual dedicated accounts," and the employer "bears the entire investment risk and . . . must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes*, 525 U.S. at 439.

By contrast, a defined contribution plan (also known as an "individual account plan") establishes an individual account for each participant, to which

the employer makes periodic contributions, often augmented by contributions from the participant. *Id.* The participant's retirement benefit in a defined contribution plan is based on the amount that has accumulated in his or her individual account by the time of retirement, from both contributions and investment earnings. *Id.* Thus, in a defined contribution plan, the participant bears the investment risk. *Id.*

Cash balance plans function similarly to defined contribution plans, but are classified as defined benefit plans. *See Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper Inc.*, 382 F.3d 587, 590 (6th Cir. 2004); Internal Revenue Service Notice 96-8, 1996-1 C.B. 359 ("Notice 96-8"). As in a defined contribution plan, the benefits in a cash balance plan are measured by the value of an account to which the employer credits a percentage of the participant's compensation. *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 62 (3d Cir. 2007). The account is also credited with interest based on a specified benchmark, *e.g.*, the annual yield on one-year U.S. Treasury securities. *Id.*; Notice 96-8. The accounts are only notional, however, *Id.*; *Crosby*, 382 F.3d at 590; benefits are paid from a general pool of assets, like in a traditional defined benefit plan. Also like a traditional defined benefit plan, if the actual investment yield of the cash balance plan's assets falls below the rate of interest guaranteed by the plan, the employer is obligated to make up the difference. *Register*, 477 F.3d at 63. Thus, in a cash balance plan, like a traditional defined benefit plan, the investment risk is borne by the employer. *Id.*

In a cash balance plan, any two employees who work for the plan sponsor for the same number of years and with the same compensation will have exactly the same account balance when their service ends, regardless of age. If, however, an age 50 employee ends his service and leaves his account in the plan until age 65, he will earn only 15 years of additional interest, but if a similarly-situated age 40 employee ends his service and leaves his account in the plan until age 65, he will earn an additional 25 years of interest. For this reason, the younger employee's "accrued benefit," defined under ERISA as the benefit payable at age 65, ERISA § 3(23), 29 U.S.C. § 1002(23), will be higher than the older employee's accrued benefit. This is the basis for the Petitioners' claim in this case that cash balance plans are inherently age-discriminatory. Petitioners contend that because the potential age 65 benefit of a younger employee is larger than the potential age 65 benefit of an older employee, the "rate of an employee's benefit accrual is reduced, because of the attainment of any age," in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H).

Petitioners are participants and former participants in the World Color Press Cash Balance Plan (the "World Color Plan"), which was previously sponsored and maintained by World Color Press, Inc. ("World Color"). Pet. App. 2-3.[1] The World Color Plan established two notional accounts – a Future Service Account for all employees, and, in the case of an employee who, like the Petitioners, had previously participated in a predecessor employer's

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[1] In 1999, World Color merged with Quebecor Printing, Inc. The surviving entity was renamed Quebecor World (USA) Inc., Respondent herein.

plan, a Transition Account. Pet. App 2. World Color posted monthly credits to participants' Future Service Accounts in an amount equal to 4% of their monthly compensation, plus interest at the rate payable on one-year U.S. Treasury bills as of the previous December 31 (with a floor of 3%). *Id.* World Color credited the Transition Account with an initial balance equal to the lump sum actuarial equivalent of the benefits participants had earned under their predecessor employer's plan, plus monthly interest at the rate payable on one-year U.S. Treasury bills as of December 31 of the prior year. *Id.*

Two of the Petitioners, Larry Drutis and Joseph Tkacz, retired from World Color on December 31, 1998 and took a distribution of their benefits from the World Color Plan at that time. *Id.* at 3. The World Color Plan contained a special "grandfathering" provision for plan participants who had participated in a plan of a predecessor employer and who met certain other conditions; such participants were entitled to receive the greater of (a) the benefit they would have received under the plan of their predecessor employer had they continued to participate in that plan until their date of retirement from World Color (taking into account their service and pay with World Color as of their retirement date), or (b) their cash balance benefit under the World Color Plan. *Id.* at 2-3. Petitioners Drutis and Tkacz were "grandfathered" under this provision, and as a result, their benefits were calculated under the plan of their predecessor employer, taking into account their service and pay with World Color. *Id.* at 3.

Petitioners Drutis and Tkacz were younger than 65 when they retired and received their benefits. *Id.* Petitioners John Simpson and Harold Parker have not yet received a distribution of their benefits; both of them are also younger than age 65. *Id.*

Petitioners filed this action alleging, *inter alia*, that the World Color Plan violated ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). Pet. App. 18. On July 7, 2006, the parties filed cross motions for summary judgment, and on September 25, 2006, the district court granted Respondent's motion, denied Petitioners' motion, and granted judgment in Respondent's favor. *Id.*

The district court made four separate holdings. First, the court held that Petitioners Drutis and Tkacz lacked standing to challenge the legality of the World Color Plan because their benefits were calculated under the terms of their predecessor employer's plan rather than the World Color Plan. Pet. App. 24-26. Second, the district court held that all of the Petitioners lacked standing to assert a claim of age discrimination under ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), because that provision applies only to benefits earned after normal retirement age – age 65 – and the Petitioners either took a full distribution of their benefits from the World Color Plan prior to age 65, or had not yet reached age 65. *Id.* at 26-28. Third, the court held that even if Petitioners possessed standing to challenge ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), Respondent was entitled to summary judgment because the World Color Plan did not discriminate on the basis of age in violation of that provision. *Id.* at 29-40. And finally, the

district court held that the relief requested by the Petitioners – monetary damages – was a legal remedy not available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), (the sole provision under which Petitioners had sued), because that provision permits the recovery of only equitable relief. *Id.* at 40-42.

On August 27, 2007, the Court of Appeals for the Sixth Circuit affirmed, unanimously holding that the World Color Plan did not discriminate on the basis of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). Pet. App. 1. The Court of Appeals also unanimously affirmed the district court's holding that Petitioners Drutis and Tkacz lacked standing to bring this action because they had suffered no injury. *Id.* at 4-5. In reaching its decision, the Court of Appeals assumed without deciding that ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), applies before age 65. *Id.* at 6-7. The Court found it unnecessary to address the district court's alternative holding that the relief sought by the Petitioners was not available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Id.* at 17.

REASONS FOR DENYING THE PETITION

Review is not warranted here. There is no split in the circuits; on the contrary, the decision of the court below is consistent with the only other two Courts of Appeals and the vast majority of the district courts that have addressed the question presented. Congress has now addressed the issue, prospectively, providing unequivocally that cash balance plans like the one at issue in this case do not discriminate on the basis of age. And finally, while

the judgment in this case in favor of the Respondent was supported by several alternative holdings in the courts below, the Petitioners have sought review of only one of them, making this case an especially poor vehicle for review of the question presented. For all of these reasons, the petition should be denied.

I. THERE IS NO CIRCUIT SPLIT ON THE SOLE QUESTION PRESENTED.

Petitioners have not identified any split in the circuits that would warrant review by this Court. On the contrary, the only other Courts of Appeals to have addressed whether cash balance plans discriminate on account of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H) – the Third and Seventh – have held, like the Court below, that they do not. *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636 (7th Cir. 2006), *cert denied*, 127 S. Ct. 1143 (2007); *Register v. PNC Fin. Servs. Group, Inc*, 477 F.3d 56 (3d Cir. 2007).

Unable to point to a circuit conflict, Petitioners instead argue that there are "two lines of contradictory authority on whether cash balance plans, per se, violate ERISA" because the decision below and the decision of the Seventh Circuit in *Cooper* conflict with three district court decisions, all from the Second Circuit. Pet. at 7.[2] However, this Court does not ordinarily grant review of a circuit court decision merely because it conflicts "with a decision rendered by a district court, whether in the

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[2] Petitioners fail to identify that there is a third circuit court decision on point, the Third Circuit's decision in *Register*, despite the fact that the Court of Appeals in this case quoted extensively from that decision.

same circuit or in another circuit." Robert L. Stern *et al.*, *Supreme Court Practice* 237 (8th ed. 2002). It is the duty of the Courts of Appeals, not this Court, to maintain uniformity within their respective circuits. *Id.* Indeed, the three district court decisions from the Second Circuit that Petitioners cite – *Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006); *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006); *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) – are themselves in conflict with ***five*** other decisions within the Second Circuit – *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008); *Custer v. S. New Eng. Tel. Co.*, No. 05CV1444, 42 Empl. Ben. Cas. 2479 (D. Conn. Jan. 24, 2008); *Bryerton v. Verizon Commc'ns, Inc.*, No. 06-cv-6672, 40 Empl. Ben. Cas. 1884 (S.D.N.Y. April 17, 2004); *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006); *Hirt v. Equitable Ret. Plan*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006). And even this conflict will soon be resolved; *Hirt* and *Bryerton* were appealed to the Court of Appeals for the Second Circuit, Case Nos. 06-4757 and 07-1680 and were argued together on April 22, 2008.

Petitioners, moreover, greatly exaggerate the extent of any alleged conflict. Consistent with the circuit courts, the overwhelming majority of district courts that have considered this issue have concluded that cash balance plans are not discriminatory. In addition to the district court below and the five other decisions from the Second Circuit cited above, at least eight other district courts have considered and rejected challenges to cash balance plans as violating ERISA

§ 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). *See, e.g.*, *George v. Duke Energy Ret. Cash Balance Plan*, No. 08-373, 2008 U.S. Dist. LEXIS 43521 (D.S.C. June 2, 2008); *Buus v. WAMU Pension Plan*, No. C07-0903, 43 Empl. Ben. Cas. 1378 (W.D. Wash. Dec. 18, 2007); *Walker v. Monsanto Co. Pension Plan*, No. 04-cv-436, 41 Empl. Ben. Cas. 2397 (S.D. Ill. Sept. 13, 2007); *Tomlinson v. El Paso Corp.*, No. 04-cv-02686, 40 Empl. Ben. Cas. 1787, 43 Empl. Ben. Cas. 1932, (D. Colo. March 22, 2007); *Sunder v. U.S. Bank Pension Plan*, No. 05-cv-01153, 2007 WL 541595 (E.D. Mo. Feb. 16, 2007); *Tootle v. ARINC Inc.*, 222 F.R.D. 88 (D. Md. 2004); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000); *Hurlic v. Southern Cal. Gas Co.*, No. 05-5027 (C.D. Cal. Oct. 18, 2005), *appeal docketed,* No. 06-55599 (9th Cir. argued Feb. 15, 2008). The three district court decisions cited by Petitioners are the ***only*** outstanding court decisions to have reached a contrary result.

At most, Petitioners have identified a split among district court decisions within a single circuit – a split that will soon be resolved. This is plainly not a sufficient basis for granting review.

II. CONGRESS HAS NOW ADDRESSED THE ISSUE.

As Petitioners acknowledge, Pet. at 8, the section of ERISA under which this dispute arose has now been amended, prospectively, to make clear that cash balance plans are not inherently age-discriminatory.

On August 17, 2006, Congress enacted the Pension Protection of 2006 ("PPA 2006"). Pub. L.

No. 109-280, 120 Stat. 780 (2006). PPA 2006 provides, among other things, that on and after June 29, 2005, a cash balance plan does not violate the age discrimination provisions of ERISA if, under the terms of the plan, a participant's benefit is equal to or greater than that of a similarly-situated younger person. PPA § 701, codified as ERISA § 204(b)(5), 29 U.S.C. § 1054(b)(5). Cash balance plans like the World Color Plan that provide all participants with the exact same compensation and interest credits regardless of age unequivocally meet this requirement. The enactment of PPA 2006 thus substantially limits the significance of the decision below, making further review by this Court unnecessary.

III. REVIEW IS NOT WARRANTED BECAUSE PETITIONERS' CLAIMS ARE LIKELY TO FAIL EVEN IF THE QUESTION PRESENTED WAS DECIDED IN THEIR FAVOR.

This case is an especially poor vehicle for review of the question presented because any decision by this Court would likely have no effect on the case's ultimate disposition. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 457 (8th ed. 2002) (case "presents a poor vehicle for resolving a conflict" where it "would be decided in favor of the Respondent no matter how the conflict is resolved.")

The district court granted summary judgment in favor of Respondent on four separate and independent grounds, one of which was dispositive as to two of the four Petitioners, and the other three of which were fully dispositive of the entire case.

Thus, in addition to its holding that the World Color Plan did not discriminate on account of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), the district court ruled that two of the Petitioners – Drutis and Tkacz – lacked standing to challenge the design of the World Color Plan because their benefits were calculated under the provisions of the plan of their predecessor employer. The Court of Appeals affirmed this holding, and the Petitioners have not asked this Court to review it. Accordingly, even if this Court were to grant review of the question presented *and* reverse the Court of Appeals' holding under ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), neither Drutis nor Tkacz would be entitled to pursue their claims.

The district court further held that none of the Petitioners had standing to bring the claims asserted in the complaint because ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), applies only to benefits earned after age 65, and that even if Petitioners had standing and had otherwise stated a valid claim, they were not entitled to any relief because the relief they sought was not available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Having held that the World Color Plan did not violate ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), the Sixth Circuit found it unnecessary to reach the merits of these two alternative grounds for granting judgment in favor of Respondents. Consequently, if the Court were to grant review and reverse the decision below, it would be required to remand the case to the Court of Appeals so that it could address these alternative holdings of the district court. Because both of the alternative holdings are also fully dispositive of the entire case, the outcome in this case would remain

the same even if the Court of Appeals were to affirm only one of them.

CONCLUSION

For all of the reasons described above, the petition for certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

LARRY DRUTIS, HAROLD PARKER, JOHN WAYNE SIMPSON, and JOSEPH TKACZ,

Petitioners,

v.

QUEBECOR WORLD (USA) INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Respondent Quebecor World (USA) Inc. respectfully submits this Supplemental Brief in support of its Brief in Opposition to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, filed June 9, 2008, to bring to the Court's attention new authority that was not available at the time Respondent filed its Brief in Opposition.

Petitioners seek review of a decision of the Sixth Circuit rejecting their claims that a cash balance plan discriminates against employees on the basis of age in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* The sole basis for the Petition was an asserted conflict between the decision below and three district court decisions, all from the Second Circuit, holding that cash balance plans are inherently age-discriminatory in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). *See Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006); *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006); *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006). Pet. at 7-8.

Respondent pointed out in its Brief in Opposition, at 7-8, that these district court decisions were not only in conflict with two other decisions of the Courts of Appeals, both of which agreed with the court below that cash balance plans are not inherently discriminatory within the meaning of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), *see*

Cooper v. IBM Pers. Pension Plan, 457 F.3d 636 (7th Cir. 2006), *cert denied*, 127 S. Ct. 1143 (2007); *Register v. PNC Fin. Servs. Group, Inc*, 477 F.3d 56 (3d Cir. 2007), but were also themselves in conflict with five other district court decisions within the Second Circuit. *See Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008); *Custer v. S. New Eng. Tel. Co.*, No. 05CV1444, 42 Empl. Ben. Cas. 2479 (D. Conn. Jan. 24, 2008); *Bryerton v. Verizon Commc'ns, Inc.*, No. 06-cv-6672, 40 Empl. Ben. Cas. 1884 (S.D.N.Y. April 17, 2004); *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006); *Hirt v. Equitable Ret. Plan*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006). Respondent further pointed out that this intra-circuit split was about to be resolved, because two of the district court decisions – *Hirt* and *Bryerton* – had been appealed to the Court of Appeals for the Second Circuit and argued on April 22, 2008.

The appeals in *Hirt* and *Bryerton* have now been decided, and the intra-circuit split has been resolved. On July 9, 2008, in *Hirt v. Equitable Ret. Plan*, Nos. 06-4757-cv, 06-5190-cv, 07-1680-cv, 2008 WL 2669346 (2d. Cir. July 9, 2008), the United States Court of Appeals for the Second Circuit joined the Courts of Appeals for the Third, Sixth and Seventh Circuits in holding that cash balance plans do not inherently discriminate on the basis of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H).

Because the three district court decisions from the Second Circuit were the *only* outstanding decisions to hold that cash balance plans discriminate on account of age in violation of ERISA

§ 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), and those decisions have now been reversed, there is no longer any basis whatsoever for the Petition, and it should, therefore, be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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August 2008

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